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OFFICE OF PETITIONS

In re Application of
Gallia, et al.
Application No. 10/035,606
Filing Date: 28 December, 2001
Attorney Docket No. TI-32942

This is a decision on the petition filed on (according to IFW) 29 November, 2004, and resubmitted via FAX on 2 February, 2005, to revive the instant application 37 C.F.R. §1.137(b) as having been abandoned due to unintentional delay.

For the reasons set forth below, the petition under 37 C.F.R. §1.137(b) **DISMISSED**.

NOTES:

- (1) Any petition (and fee) for reconsideration of this decision must be submitted within two (2) months from the mail date of this decision. Extensions of time under 37 C.F.R. §1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 C.F.R. §1.137(b)."
- (2) Thereafter, there will be no further reconsideration of this matter.

BACKGROUND

The record reflects that:

- Petitioner failed to reply timely and properly to the non-final Office action mailed on 26 September, 2003, with reply due absent extension of time on or before Monday 29 December, 2003 (the Office having been closed 26 December);
- the Application went abandoned after midnight 26 December, 2003;
- the Office mailed a Notice of Abandonment on 18 May, 2004;
- the instant petition was filed with fee, **and an incomplete statement of unintentional delay** (Petitioner is cautioned to use the Office form for the petition or track the language of the regulation) on (according to IFW) 29 November, 2004, and resubmitted via FAX on 2 February, 2005—however, the file contains no reply to the 26 September, 2003, Office action and Petitioner's FAX submission contains no reply as well.

Thus, Petitioner has not satisfied the "reply" requirement of the regulation.

STATUTES, REGULATIONS AND ANALYSIS

Congress has authorized the Commissioner to "revive an application if the delay is shown to the satisfaction of the Commissioner to have been "unavoidable." 35 U.S.C. §133 (1994).¹

The regulations at 37 C.F.R. §1.137(a) and (b) set forth the requirements for a petitioner to revive a previously unavoidably or unintentionally, respectively, abandoned application under this congressional grant of authority. The language of 35 U.S.C. §133 and 37 C.F.R. §1.137(a) is clear, unambiguous, and without qualification: the delay in tendering the reply to the outstanding Office action, as well as filing the first petition seeking revival, must have been unavoidable for the reply now to be accepted on petition.²

Delays in responding properly raise the question whether delays are unavoidable.³ Where there is a question whether the delay was unavoidable, Petitioners must meet the burden of establishing

¹ 35 U.S.C. §133 provides:

35 U.S.C. §133 Time for prosecuting application.

Upon failure of the applicant to prosecute the application within six months after any action therein, of which notice has been given or mailed to the applicant, or within such shorter time, not less than thirty days, as fixed by the Commissioner in such action, the application shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner that such delay was unavoidable.

² Therefore, by example, an unavoidable delay in the payment of the Filing Fee might occur if a reply is shipped by the US Postal Service, but due to catastrophic accident, the delivery is not made.

³ See: *Changes to Patent Practice and Procedure; Final Rule Notice*, 62 Fed. Reg. at 53158-59 (October 10, 1997), 1203 Off. Gaz. Pat. Office at 86-87 (October 21, 1997).

that the delay was unavoidable within the meaning of 35 U.S.C. §133 and 37 C.F.R. §1.137(a).⁴ And the Petitioner must be diligent in attending to the matter.⁵ Failure to do so does not constitute the care required under Pratt, and so cannot satisfy the test for diligence and due care.

(By contrast, unintentional delays are those that do not satisfy the very strict statutory and regulatory requirements of unavoidable delay, and also, by definition, are not intentional.⁶))

Allegations as to Unintentional Delay

A grantable petition under 37 C.F.R. §1.137(b) requires a petition, fee, statement of unintentional delay, reply, and a terminal disclaimer and fee if appropriate.

As indicated above, Petitioner has failed to satisfy the reply requirement of the regulation.

CONCLUSION

The petition under 37 C.F.R. §1.137(b) is dismissed.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Commissioner for Patents
 P.O. Box 1450
 Alexandria, VA 22313-1450

By FAX: IFW Formal Filings
 (703) 872-9306
 ATTN.: Office of Petitions

By hand: Mail Stop: Petition
 Customer Service Window
 Randolph Building
 401 Dulany Street
 Alexandria, VA 22314

⁴ See: In re Application of G, 11 USPQ2d 1378, 1380 (Comm'r Pats. 1989).

⁵ See: Diligence in Filing Petitions to Revive and Petitions to Withdraw the Holding of Abandonment, 1124 Off. Gaz. Pat. Office 33 (March 19, 1991). It was and is Petitioner's burden to exercise diligence in seeking either to have the holding of abandonment withdrawn or the application revived. See 1124 Off. Gaz. Pat. Office *supra*.

⁶ Therefore, by example, an unintentional delay in the reply might occur if the reply and transmittal form are to be prepared for shipment by the US Postal Service, but other pressing matters distract one's attention and the mail is not timely deposited for shipment.

Telephone inquiries concerning this decision may be directed to the undersigned at (571) 272-3214.

A handwritten signature in black ink, consisting of a large, stylized 'J' and 'G' intertwined, with a horizontal line extending to the right.

John J. Gillon, Jr.
Senior Attorney
Office of Petitions